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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL MEZA,

Defendant and Appellant.

F068795

(Super. Ct. No. VCF282669)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Kane, J. and Smith, J.

INTRODUCTION

Defendant, Abel Meza, was charged with one count of making a criminal threat against “L.R.” (count 1; Pen. Code,¹ § 422), one count of making a criminal threat against “G.M.” (count 2; § 422), one count of sexual battery by restraint (count 3; § 243.4, subd. (a)), one count of assault with a firearm (count 4; § 245, subd. (a)(2)), two counts of felon in possession of a firearm (counts 5 and 6; § 29800, subd. (a)(1)), one count of stalking (count 7; § 646.9, subd. (a)), one count of exhibiting a firearm (count 8; § 417, subd. (a)(2)), and two counts of misdemeanor sexual battery (counts 9 and 10; § 243.4, subd. (e)(1)). The information also contained numerous special allegations and enhancements.

Following a jury trial, defendant was found guilty on all counts, and the trial court imposed gun use, serious felony, and prior prison term enhancements. The trial court stayed defendant’s conviction for assault with a firearm and for one count of felon in possession of a firearm pursuant to section 654, and sentenced defendant to an aggregate term 29 years four months.

On appeal, defendant argues (1) his one-year sentence enhancement under section 667.5, subdivision (b) should be stricken, and (2) his sentence for stalking should be stayed under section 654. This court also requested briefing on the questions of (1) whether defendant’s conviction for display of a firearm should be stayed under section 654, and (2) whether defendant’s conviction for making a credible threat should be stayed under section 654. We remand to the trial court with directions to strike the one-year prior prison term enhancement. In all other respects, the judgment is affirmed.

FACTS

On April 24, 2013, defendant approached L.R. and her two-year-old daughter outside the home of L.R.’s boyfriend, G.M. Defendant asked if G.M. was home, and

¹ All subsequent statutory references are to the Penal Code.

when L.R. answered that he was not, defendant displayed a handgun, placed his hand on L.R.'s daughter's head, and asked, "[y]ou wouldn't lie to me now, would you?" L.R. stated that she was telling the truth, and defendant promised to return.

On April 29, 2013, L.R. was approached by defendant outside of her apartment, and she ran inside to call the police. Later that day, she found a note from defendant slipped under her door that promised "payback" against G.M., threatened the lives of L.R., G.M., and L.R.'s daughter, and stated that defendant knew where L.R. worked.

On April 30, 2013, G.M. received a note from defendant stating that he was watching G.M. and L.R., and threatening to kill G.M. and rape L.R. at gunpoint. Later the same day, G.M. received a phone call and text message claiming that L.R. was being watched while she left work.

Shortly after G.M. received those threats, L.R. arrived home from work, and defendant approached her and placed a gun to her head. Defendant proceeded to grope L.R.'s breasts, buttocks, and vagina before fleeing. L.R. contacted the police, and defendant was apprehended that same day.

DISCUSSION

I. Defendant's one-year sentence enhancement must be stricken.

At sentencing, the trial court enforced a five-year serious felony enhancement pursuant to section 667, subdivision (a)(1), as well as a one-year prior prison term enhancement pursuant to section 667.5, subdivision (b). Both enhancements, however, were based on the same prior conviction. When a court imposes both a serious felony enhancement and prior prison term enhancement based on the same conviction, the prior prison term enhancement must be stricken. (*People v. Jones* (1993) 5 Cal.4th 1142, 1152.) Accordingly, we order defendant's judgment modified to strike the one-year sentence enhancement under section 667.5, subdivision (b).

II. Defendant's sentence for stalking should not be stayed under section 654.

Next, defendant argues his sentence for stalking should be stayed under section 654, as it was part of a continuous course of conduct that included his convictions for making a criminal threat against L.R., display of a firearm, being a felon in possession of a firearm, sexual assault, and assault with a firearm. We disagree.

Under section 654, subdivision (a), “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” This protection extends to cases where multiple offenses were committed during an indivisible course of conduct. (*People v. Oates* (2004) 32 Cal.4th 1048, 1062.) “Whether a course of criminal conduct is divisible ... depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

Even if we accepted defendant's claim that the convictions enumerated above were part of a continuous course of conduct with a common intent and objective, the remedy would not be the staying of defendant's conviction for stalking, but rather the staying of *all* of the enumerated convictions with the exception of sexual assault, which carried the longest term of imprisonment. Accordingly, defendant's claim that his sentence for stalking should be stayed is misguided.

Taken generously, however, defendant's argument can be refashioned to assert the trial court erred by failing to stay the convictions that were part of defendant's continuous course of conduct in stalking L.R. We will discuss each of those convictions in turn.

A. Assault with a firearm.

Though defendant identifies his conviction for assault with a firearm as part of his continuous course of conduct in stalking L.R., the court already stayed the conviction

under section 654, as it stemmed from the same acts that established defendant's conviction for sexual battery. Therefore, the issue is moot.

B. Sexual battery by restraint.

Defendant contends that his sexual battery of L.R. was part of his indivisible course of conduct in stalking the victim.² This argument is not well taken. While defendant's stalking preceded the sexual battery, the assault clearly differed from the stalking in nature and scope, and also evidenced an additional intent and objective: to achieve sexual gratification. (See § 243.4 [conviction for sexual battery requires the defendant to have acted with "the purpose of sexual arousal, sexual gratification, or sexual abuse."].)

Even in light of section 654, if a defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Accordingly, as defendant had the independent objective of achieving sexual arousal, gratification, or abuse when he assaulted the victim, the court did not err by punishing defendant separately for the stalking and the sexual battery.

C. Felon in possession of a firearm.

Defendant also contends his conviction for felon in possession of a firearm was part of his continuous course of conduct in stalking L.R. Again, we disagree.

² As noted above, even if the sexual assault were deemed part of a continuous course of criminal conduct for the purposes of section 654, the conviction would not be stayed as it carries the longest sentence of any of the convictions defendant alleges constituted a continuous course of conduct. Instead, all of the *other* convictions contained in the continuous course of conduct would be stayed.

For the purposes of section 654, “[p]ossession of [a] gun constitute[s] one offense, and [is] ... an act separate and apart from any use that [is] made of the gun[.]” (*People v Hudgins* (1967) 252 Cal.App.2d 174, 185.) Therefore, section 654 does not require that a conviction for felon in possession of a firearm be stayed, as mere possession is a “completed offense,” outside the scope of any additional criminal course of conduct. (*Hudgins, supra*, at p. 185.) Defendant’s characterization to the contrary is without merit.

D. Display of a firearm and making a criminal threat.

Defendant further contends that his convictions for display of a firearm and making a criminal threat were also part of his continuous course of conduct in stalking L.R. After further briefing by the parties, we conclude the court did not err by failing to stay either of those convictions.

Section 646.9, subdivision (a) states “[a]ny person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking”

Under this definition, it would appear as though defendant’s convictions for displaying a firearm and making a criminal threat formed the basis of his conviction for stalking, and therefore represented acts within an indivisible course of conduct. However, as noted above, “if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.]” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

Here, while defendant’s actions in displaying a firearm to L.R. and leaving a threatening note were clearly intended to place her in fear for her safety and the safety of her daughter, the evidence also shows that defendant harbored additional intents and

objectives. For example, defendant displayed the firearm to L.R. in an effort to make contact with and harass G.M., while the threatening note also evidenced a clear intent to secure “payback” against G.M.

Further, “““a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]” [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]’ [Citation.]” (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

In the instant case, defendant stalked L.R. over a period of six days, and the display of the firearm and criminal threat were separated by a period of five days. As such, defendant was afforded ample opportunity to reflect and renew his intent between each act of harassment against the victim. This renewal of intent clearly aggravated the offenses already committed, as it only increased the scope and intensity of defendant’s harassing and terrorizing behavior, and justified the imposition of separate punishments for display of a firearm, making a criminal threat, and stalking. (See *People v. Felix* (2001) 92 Cal.App.4th 905, 915 [“[M]ultiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense carried a new risk of harm.”].)

DISPOSITION

The case is remanded to the trial court with directions to strike the one-year prior prison term enhancement under subdivision (b) of section 667.5, and to send to the Department of Corrections and Rehabilitation a corrected abstract of judgment. In all other respects, the judgment is affirmed.